STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:	)	
Request for Regulatory Determination filed by the CENTER FOR PUBLIC INTEREST LAW regarding the STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS' policy that it is not authorized to investigate fee disputes between professional engineers and consumers[1]	)	**1998 OAL Determination No. 15**
	)	**[Docket No. 91-013]**
	)	**August 13, 1998**
	)	**Determination Pursuant to Government Code section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: CHAR MATHIAS, Assistant Chief Counsel

HERBERT F. BOLZ, Supervising Attorney
MARC D. REMIS, Senior Staff Counsel

SYNOPSIS

A public interest group is challenging a state licensing board's refusal to investigate consumer fee disputes. The State Board of Registration for Professional Engineers and Land Surveyors issued the policy in its "Customer Complaint Form" and in an official newsletter mailed to licensees. The legal issue is whether the policy is a "regulation." If the policy is held to be a "regulation," then it is without legal effect unless and until adopted in compliance with the Administrative Procedure Act.[2]

The Office of Administrative Law concludes that the policy is a "regulation," not complying with the Administrative Procedure Act, and therefore without legal effect.

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ISSUE

The Office of Administrative Law ("OAL") has been requested to review a policy of the State Board of Registration for Professional Engineers and Land Surveyors ("Board") that denies it has authority to investigate fee disputes between consumers and engineers or land surveyors. OAL is charged with determining[3] whether the policy is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA"). The request challenges both the "Consumer Complaint Form (rev. 1990)" ("complaint form") and the "Spring 1990 Professional Engineers and Land Surveyors Report" ("Report").

The Office of Administrative Law concludes that the policy is a "regulation" required to be adopted pursuant to the APA. Therefore, it is without legal effect until duly adopted.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS' QUASI-LEGISLATIVE ENACTMENTS?

The Board[4] is a subdivision of the Department of Consumer Affairs ("DCA").[5] The Professional Engineers Act,[6] and the Professional Land Surveyors' Act,[7] respectively, make the Board responsible for the registration, certification, and oversight of professional engineers and land surveyors in California.

The Board has been granted general rulemaking authority in Business and Professions Code section 6716 as follows:

"The board may adopt rules and regulations consistent with law and necessary to govern its action. *These rules and regulations shall be adopted in accordance with the provisions of the Administrative Procedure Act.*"[8] [Emphasis added.]

Given that the Board has been granted rulemaking authority subject to an express mandatory duty to utilize APA procedures, OAL concludes that the APA is applicable to the Board.[9]

Background

This request for determination ("request") was filed with OAL by the Center for Public Interest Law ("CPIL") on April 22, 1991. After the request was filed, the Board revised the complaint form, dropping the fee dispute provision. On May 22, 1998, OAL published a summary of this request in the California Regulatory Notice Register,[10] along with a notice inviting public comment. Two comments were received during the 30-day written public comment period.

CPIL argued that the complaint form disavowed any Board authority to investigate fee disputes between consumers and engineers or land surveyors.[11] The Board[12] and the Consulting Engineers and Land Surveyors of California ("CELSOC")[13] both argued that the issue was moot[14] since the Board had later changed the complaint form by removing the objectionable language. CPIL believed that its challenge to the policy was not moot and insisted that a determination be issued by OAL.

Both CELSOC[15] and the Board[16] argued that the Board's rescission was not a reaction to CPIL's request for determination, but rather had occurred because the Board concluded that the challenged form provision "may be misleading in that it may discourage individuals from filing complaints on which the board is authorized to act." Even though recission of the challenged policy meets one of the requester's goals, it does not relieve OAL of its duty to issue a regulatory determination. All these issues will be examined below.

The agency's intent in rescinding an alleged regulation is not determinative of the question whether the policy when operative fell within the definition of "a regulation." The Board apparently has removed the offending text from the complaint form.[17] This action does not have any bearing on the basic issue before OAL--whether the policy was an invalid "regulation" at the time of the request for determination in 1991.[18]

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision in Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any such rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . .. [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[19] the California Court of Appeal upheld OAL's two-part test[20] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra,* 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"[21]

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

The challenged policy was issued in two versions, to two separate

audiences. The complaint form issued the policy to consumers who used the services of professional engineers or land surveyors (in other words, the licensees). The Report issued the policy to the licensees.[22]

CPIL quoted the complaint form[23] as providing:

> "The Board does not have authority to investigate disputes regarding client fees. Such disputes are considered civil matters. If you have a fee dispute, you may wish to contact an attorney of your choice or to resolve the dispute in small claims court."

The challenged rule interprets the scope of the Board's investigatory powers granted under the Business and Professions Code. Apparently, this version of the complaint form was the one used for all consumers statewide in regard to Board licensees. In addition, the Board published its policy in its official newsletter, the Report. Presumably, the Report went out to all licensees, updating them on Board policies and interpretations. The Report, states, in part:

> "The Enforcement Unit frequently receives complaints which do not fall under the board's jurisdiction. Examples of violations which the board cannot act upon include: Fee disputes (unless related to a contract)."[24]

The Board argues in its response as follows:

> "The answer to the first part of the inquiry [under *Grier*, above, concerning whether the challenged rule is a standard of general application] in the instant case is 'no.' Consequently, it is not necessary to address the second part of the inquiry [under *Grier*]."[25]

The Board argued in its response that since the policy had been rescinded, that it could not constitute a standard of general application. OAL rejects this argument. The agency's action rescinding an alleged "regulation" is

not determinative of the question whether the policy when operative was a standard of general application.

In its response, the Board further argues:

> "*Every consumer complaint reviewed by the board, is handled on a case-by-case basis* in order to determine if there is a violation of the licensing act. The board *currently* has no practice of refusing to consider violations of the licensing acts with issues related to fee disputes since such complaints may also relate more specifically to violations for which the board has specific authority to investigate (Business and Professions Code sections 6775 and 8780) and take appropriate disciplinary action." [Emphasis added.][26]

The Board's policy, in both the form and the Report versions, applies by its terms to all consumers and all licensees. OAL concludes that the challenged policy as articulated in the two documents is a standard of general application. Thus, the first prong of *Grier's* two-prong test is satisfied.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Above, in the discussion of the Board's rulemaking authority, OAL established the Board's general authority to adopt regulations governing the practice of engineering and land surveying in California,[27] and its duty, under the law that created DCA, to protect consumers. The Board has general authority under the DCA to investigate wrongdoing, e.g., ". . . conducting investigations of violations of laws under its jurisdiction . . . ."[28] The Board also has specific authority to investigate complaints and conduct disciplinary proceedings against engineers it finds "guilty . . . of any deceit, misrepresentation, violation of contract, fraud, negligence or incompetency in his [or her] professional practice."[29] The Board has

previously implemented, interpreted and made specific this authority by adopting regulations concerning disciplinary orders, citations and fines.[30]

The Board's policy of *not* investigating fee disputes against licensees, interprets and makes specific Business and Professions Code section 6785, which provides that:

> "The board shall have the power, *duty*, and authority to investigate violations of the provisions of this chapter." (Emphasis added.)

This policy also interprets the Board's investigatory duties under Business and Professions Code sections 6716, 6775 and 8780. Section 6775 provides:

> "*The board may receive and investigate complaints against registered professional engineers, and make findings thereon.*
>
> By a majority vote, the board may reprove, privately or publicly, or may suspend for a period not to exceed two years, or may revoke the certificate of any professional engineer registered hereunder:
>
> (a) Who has been convicted of a crime substantially related to the qualifications, functions and duties of a registered professional engineer, in which case the certified record of conviction shall be conclusive evidence thereof.
>
> (b) *Who has been found guilty by the board of any deceit, misrepresentation, violation of contract, fraud, negligence or incompetency in his practice.*
>
> (c) Who has been found guilty of any fraud or deceit in obtaining his certificate.

(d) Who aids or abets any person in the violation of any provisions of this chapter.

(e) Who violates any provision of this chapter. " [Emphasis added]

The Board's response reasoned that since neither the Professional Engineers Act[31] nor the Professional Land Surveyors' Act[32] has any provisions specifically related to "fee disputes," the Board's previous policy statement regarding fee disputes could not implement, interpret or make specific any law administered by the Board. Thus, the contested statement could not satisfy the definition of "a regulation."[33, 34]

While the Board is correct that no statute in the two licensing Acts actually mentions the term "fees" charged by licensees, the Board as part of DCA has a primary mission of protecting the public from licensee misconduct.[35] Violations of the Code are misdemeanor offenses.[36] Further, it is the *duty* of the Board to "aid these [law enforcement and judicial] officers in the enforcement of this chapter.[37]

Thus, the Board has a duty to investigate misconduct allegations made against licensees for possible disciplinary action and referral to law enforcement for prosecution. This misconduct may involve any violation of the Code including, but not limited to: licensee deceit, misrepresentation, violation of contract, fraud, negligence or incompetency in the licensee's professional practice.[38] In conclusion, investigating fee disputes may lead to discovery of misconduct well within the Board's specifically enumerated responsibilities.[39]

The Board's response also stated:

> "[F]ees . . . [are] typically set by the marketplace and subject to negotiation between private parties. . . .. so long as the licensee has provided all the services that were agreed upon and done so in a competent manner, the licensee is probably not [for the purposes of discipline by the Board] in breach of contract. . . .."[40]

The Board reasoned that it has no jurisdiction to become involved in fee disputes since "civil courts perform that function." However, if the licensee has breached the contract[41] by fraud, misrepresentation, deceit, negligence, incompetence or failure to perform,[42] then the Board asserted that it would properly review the consumer's complaint including fees, investigate and discipline as necessary.

The Board's statements of its own jurisdiction and description of the role of courts in certain disputes concerning licensees are themselves interpretations of statutes. As interpretations of statute, these pronouncements also satisfy the definition of "regulation," since they implement, interpret and make specific the law administered by the Board.[43]

The Board cites Business and Professions Code section 129 for the proposition that the Board lacks jurisdiction to "regulate fees."[44] That section provides:

> "The board shall, when the board deems it appropriate, notify the person against whom the complaint is made of the nature of the complaint, may request appropriate relief for the complainant, and may meet and confer with the complainant and the licentiate in order to mediate the complaint. *Nothing in this subdivision shall be construed as authorizing or requiring any board to set or to modify any fee charged by a licentiate.*" [Emphasis added]

In its response, the Board interprets its own authority more narrowly than is required by the statutory language cited above. While the statute does not authorize or require the Board to set or modify fees (viz., forcing the licensee to give the customer's money back), neither does it prevent the Board from investigating misrepresentation, fraud or violation of contract concerning fees. The Board admits as much later in its response.[45]

The challenged policy implements, interprets and makes specific laws enforced by the Board. Thus, OAL concludes that second prong of

Grier's two-prong test is satisfied. We have already concluded above that the challenged policy is a standard of general application. Thus, we conclude that the challenged policy is a "regulation" within the meaning of Government Code section 11342, subdivision (g).

The Board's policy must be found to be invalid unless it falls within an express statutory exception to the APA.[46]

III. DO ANY GENERAL EXCEPTIONS TO APA REQUIREMENTS APPLY TO THE CHALLENGED POLICY?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[47] However, rules concerning specified activities of state agencies are not subject to the procedural requirements of the APA.

A. THE FORMS EXCEPTION

In its response, the Board states:

> "The statement in the form is not a prohibited underground regulation[48] since it fits within the forms exception to the definition of 'a regulation.'[49] Government Code section 11342 exempts from the definition of 'regulation' 'any form prescribed by a state agency or any instructions relating to the use of the form.' . . .. It is not a regulation."[50]

The Board's response does not quote the next clause in section 11342; which reads in part:

> "(g) . . . 'Regulation' does not mean . . . any form prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a*

regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued." [Emphasis added.]

According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a "statutory exemption relating to *operational* forms." (Emphasis added.)[51] An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name or address of the applicant.

By contrast, if an agency form goes beyond repeating existing legal requirements, then, Government Code section 11342, subdivision (b), requires a formal regulation "to implement the law under which the form is issued." For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., "no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion."

In other words, if a form contains "uniform substantive" rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a regulation is not "needed to implement the law under which the form is issued" insofar as the form is a simple operational form limited in scope to *existing* legal requirements.[52]

In sharp contrast, both the Board's response and CELSOC's comment read Government Code section 11342 as exempting from the APA "any" form prescribed by a state agency. This reading of section 11342 is too broad.

An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient

of typing regulatory material into a form would result in the exception swallowing the rule. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, the forms language in section 11342 cannot be reasonably interpreted in such a way as to free agencies from all APA compliance responsibilities.

As discussed in Part IIA, above, the challenged policy was issued in two versions: (1) the complaint form issued the policy to consumers; and (2) the Report issued the policy to the licensees.

The Board asserts both that the policy version in the complaint form is merely a "form" and also that it is merely an "*instruction* to a form." Since either status of that version could at least arguably exempt it from the definition of a "regulation," both shall be discussed. Since CPIL asserts that the policy version announced in the Report is not an exempt form, that issue shall also be discussed.

First, the complaint form is not merely an "operational" form. In advising consumers of their *rights* to file complaints against licensees, pursuant to the Business and Professions Code, the Board informed the consumers of "substance," not form. The policy is a *substantive* criterion for excluding certain types of complaints (fee disputes) from being accepted for investigation by the Board. The policy is substantive since it specifically implements, interprets and makes specific various statutes enforced by the Board, including Business and Professions Code section 129, subdivision (c), concerning the Board's scope of authority over certain aspects of fee disputes, and section 129, subdivision (e), requiring that the Board notify consumers of the extent of its functions under statute. Since the Board is making new substantive rules by issuing this policy, the forms exception does not apply.

Second, the Board asserts that the policy in the complaint form is merely an operational instruction on how to complete the form. The Board policy does not merely instruct the user concerning completion of the form; rather, the Board is specifically directing complaints regarding "fee disputes" to other forums, such as the courts. In so doing, the Board interprets its jurisdiction and Business and Professions Code section 129. Since the policy is interpretive of the law governing the Board, it cannot be merely an exempt "instruction to a form."

Last, CPIL argues that the policy version issued to the licensees in the Report cannot fall within the "forms" or "instructions to forms" exception, since it was issued in the official newsletter rather than in the complaint form. Neither the Board nor CELSOC discusses the effect of the policy's publication in the Report. OAL agrees with the requester, that the policy as published in the Report is neither an *operational* "form" nor an "instruction relating to the use of a form."

Since the Board's policy, whether the version in the complaint form or the version in the Report, does not fall within the "forms" exception, OAL next determines whether the policy falls within any other general exception to APA requirements.

B. THE "INTERNAL MANAGEMENT" EXCEPTION

Agencies issuing forms often argue that these are exempt as matters of "internal management." Although neither the Board nor CELSOC claimed the policy was exempt as internal management, CPIL argued that the policy was *not* internal management.[53] Since internal management is a tenable argument in this dispute, OAL will discuss this exemption briefly.

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of individual state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

Grier v. Kizer provides a good summary of the case law on internal management.[54] After quoting Government Code section 11342, subdivision (g), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.]' 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes* . . . ." [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.]"[55]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held a Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody . . . ."

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not *per se* fall within the internal management exception . . .."[56]

CPIL argues that the Board's policy is not within the "internal management" exception since (a) it is one of general application, concerning Board consideration and disciplinary jurisdiction of a major category of consumer complaints; and (b) it has an external impact on all licensees and all consumers, not merely an internal impact on Board employees.[57]

The complaint form is a primary tool used by the Board in carrying out its duties assessing whether licensees are practicing their professions competently and without causing injury to the public. These Board duties are of critical importance to California, ensuring that engineers and land surveyors provide competent professional services while protecting the public health, safety, and welfare. The policy set forth in both the complaint form and the Report is a matter of public import, beyond the immediate realm of the Board and its licensees. Therefore, the challenged policy does not fall within the "internal management" exception to the APA.

OAL concludes that the Board's policy falls within neither the forms nor the internal management exception to the APA. No other general APA exceptions appear to apply.

CONCLUSION

For the reasons set forth above, OAL finds that:

(1) The Board's quasi-legislative enactments generally must be adopted as regulations pursuant to the APA;

(2) The challenged policy is a "regulation" as defined in the key provisions of Government Code section 11342, subdivision (g);

(3) No exceptions to APA requirements apply to the policy found to be a "regulation"; and

(4) The policy violates Government Code section 11340.5, subdivision (a).

DATE: August 13, 1998

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ENDNOTES

1. This request for determination was filed by William J. Braun, Intern, University of San Diego Center for Public Interest Law, 5998 Alcala Park, San Diego, CA 92110; telephone number (619) 260-4806. Julianne D'Angelo Fellmeth, Administrative Director of CPIL, submitted a comment on June 16, 1998. The Board of Registration for Professional Engineers and Land Surveyors was represented by Gary W. Duke, Staff Counsel, Department of Consumer Affairs, Legal Office, 400 R Street, Suite 3090, Sacramento, CA 95814; telephone number (916) 445-4216.

   This determination may be cited as "**1998 OAL Determination No. 15**."

2. According to Government Code section 11370:

   > "*Chapter 3.5* (commencing with section 11340), *Chapter 4* (commencing with section 11370), *Chapter 4.5* (commencing with section 11400), . . . *and Chapter 5* (commencing with section 11500) *constitute* and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

   We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

   "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is invalid and unenforceable unless

   (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

   (2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

   See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to

the APA, was "invalid").

OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*. Furthermore, *Tidewater* holds that an agency rule issued in violation of the APA is "void," but that agency action based upon the voided rule will not be automatically invalidated.

4. Established by Statutes of 1983, chapter 150, section 4 (Business and Professions Code section 6710.)

5. Business and Professions Code section 6710.

6. Business and Professions Code, sections 6700 through 6799.

7. Business and Professions Code sections 8700 through 8799.

8. Business and Professions Code section 6716.

9. The APA would apply to the Board's rulemaking even if Business and Professions Code section 6716 did not expressly so provide. The APA applies generally to state agencies, as defined Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).

10. California Regulatory Notice Register 98, No. 21-Z, May 22, 1998, 1022.

11. See endnote 1, above.

12. The Board submitted its response to the request for determination on July 8, 1998. See endnote 1, above.

13. A written comment dated June 9, 1998, was submitted on behalf of CELSOC by James P. Corn of Washburn, Briscoe & McCarthy, 770 L Street, Suite 990, Sacramento, CA 95814; telephone number (916) 447-0700.

14. CELSOC argued that the request for determination was moot since the Board deleted the policy from its complaint form once notified by CPIL. CPIL addressed these issues in its public comment, believing that its challenge to the policy was not moot, even though the

Board removed the policy statement from the form, since: (1) removal from the form is not equivalent to ceasing enforcement of the policy; and (2) this policy is easily capable of repetition or revival by the Board.

The Board argued that the request was moot and therefore not "a regulation" because the Board revised form to delete the challenged policy. OAL concludes that the determination should be issued. Even if the issue raised in the request were moot, OAL would nonetheless have a legal duty to respond to a duly accepted request.

See **1991 OAL Determination No. 6** (Department of Developmental Services, October 3, 1991, Docket No. 90-008), typewritten version, p. 156; CRNR 91, No. 43-Z, October 25, 1991, p. 1451, at p.1453. Also see **1990 OAL Determination No. 6** (Department of Education, March 20, 1990, Docket No. 89-012), typewritten version, pp. 152-153; CRNR 90, No. 13-Z, March 30, 1990, p. 496.

1991 OAL Determination No. 4, p. 85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910; *Memorial, Inc. v. Harris* (9th Cir. 1980) 655 F.2d 905, 910, n. 14. OAL must thus respond to the request pursuant to its own regulations; see Title 1, CCR, sections 123 and 126.

15. CELSOC's comment, pp. 1-2.

16. Response, p. 3.

17. After receiving a copy of the request from CPIL, the Board responded to it on August 21, 1991.

18. Title 1, CCR section 122, subsection (a)(3), *Contents of Requests for Determination*, provides that the requester must submit either a copy of the challenged agency rule or a description of the rule and its application to affected persons. Title 1, CCR section 123, subsection (b) provides that all requests for determination which meet the requirements of section 122 shall be considered by OAL in the order in which they are received. Taken together, these regulations require OAL to act on all accepted requests, in the order received. The only exception would be where a request is withdrawn by the requester. Otherwise, OAL is bound to obey its own regulations and to issue a determination on the rule as it stood at the time of the request was filed.

19. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though

Poschman had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 667,67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

20. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

21. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

22. For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

23. Request, p. 1.

24. Request, Exhibits C-1 and C-2.

25. Response, p. 3.

26. Response, p. 4.

27. Business and Professions Code section 6716.

28. Business and Professions Code section 108, entitled "Functions of Boards."

29. Business and Professions Code section 6775 (first paragraph and subdivision (b)).

30. 16 CCR sections 419, 473 and 473.1.

31. Business and Professions Code sections 6700 through 6799.

32. Business and Professions Code sections 8700 through 8799.

33. Government Code section 11342, subdivision (g).

34. Response, p. 3.

35. The Board as part of DCA was "established for the purpose of ensuring [licensees] are adequately regulated in order to protect the people of California." Business and Professions Code section 101.6. The Board has general authority under the DCA to investigate wrongdoing, e.g., ". . . conducting investigations of violations of laws under its jurisdiction . . .." (Business and Professions Code section 108, entitled "Functions of Boards.")

    The Board has specific authority to investigate complaints [Business and Professions Code section 6785]. Section 6775, in part, provides:

    "*The board may receive and investigate complaints against registered professional engineers,* and make findings thereon. . . . [concerning] deceit, misrepresentation, *violation of a contract*, fraud, negligence or incompetency." [Emphasis added.]

36. Business and Professions Code section 6787 [first paragraph and subdivision (j)].

37. Business and Professions Code section 6786.

38. Business and Professions Code section 6775, subdivision (b), and 6787, subdivision (j).

39. Business and Professions Code sections 101.6, 108, 6775, 6785, and 6786.

40. Response, p. 3.

41. Business and Professions Code sections 6775, subdivision (b), and 8780, subdivision (f).

42. Business and Professions Code sections 6775, subdivision (b) and 8780, subdivision (a).

43. See discussion of Government Code section 11342 subdivision (g), and the *Grier* test discussed in Part IIA, above. Also see endnote 14, above.

44. Response, p. 3.

45. Response, pp. 3-4.

46. Government Code section 11340.5.

47. Government Code section 11346.

48. Government Code section 11340.5

49. Government Code section 11342, subdivision (g).

50. Response, p. 3.

51. (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

52. Id.

53. CPIL's comment, pp. 2-3.

54. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

55. In a footnote at this point, the Court states: "*Armistead* disapproved *Poschman* on other grounds. (*Armistead*, supra, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)"

56. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

57. CPIL's comment, p. 3.